78-1018

In The

Supreme Court of the United States

December Term, 1978

No. .....

DONALD FIGGINS, AND SERGEANT NESSELRODT,
Correctional Officers, Field Unit #30
Virginia Department of Corrections,
Petitioners,

v.

JAMES MARTIN HUDSPETH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRELIMINARY STATEMENT

Donald Figgins and Sergeant Nesselrodt are Correctional Officers of Field Correctional Unit #30, of the Virginia Department of Corrections, and pray that a Writ of Certiorari will issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on October 5, 1978, in the case of James Martin Hudspeth v. Donald Figgins, Sergeant Nesselrodt, Correctional Officers of Virginia Department of Corrections Field Unit #30.

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division, dated January 18, 1977, is unreported and is included herein as Appendix B. The opinion of the United States Court of Appeals for the Fourth Circuit is yet unreported and is also included herein as Appendix C. The respondent's *pro se* complaint which initiated this action in the District Court is enclosed as Appendix A.

JURISDICTION

The jurisdiction of this Court to issue the Writ of Certiorari in this case is grounded upon 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1983. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for Redress."

CONSTITUTIONAL PROVISIONS INVOLVED

I. Constitution of the United States Amendment VIII: "Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

II. Constitution of the United States, Amendment XIV, Section 1 ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

(1) Did The United States Court Of Appeals For The Fourth Circuit Err In Finding That An Intentional Threat By A Correctional Officer To A Prisoner Amounts To A Denial Of Access To The Courts If Reasonably Calculated To Do So Even Though The Prisoner's Access Was Not Actually Obstructed?

(2) Did The United States Court Of Appeals For The Fourth Circuit Err In Finding That A Threat By A Correctional Officer To A Prisoner, Which Places The Prisoner In Fear For His Life Is Cruel And Unusual Punishment Contrary To The Eighth Amendment Of Constitution Of The United States?

STATEMENT OF THE CASE

The petitioners are Correctional Officers Donald Figgins, and Sergeant Nesselrodt, of Virginia's Correctional Field Unit #30, located near Alexandria, Virginia, and the respondent is James Martin Hudspeth, a prisoner who was incarcerated at that unit. On January 18, 1977, the United States District Court for the Eastern District of Virginia, Alexandria Division, ordered that the respondent's *pro se* complaint (apparently treated as cognizable under 42 U.S.C. § 1983 and 28 U.S.C. § 1343), *Hudspeth* v. *Figgins,* and *Nesselrodt,* Civil Action No. 77-46-AM be filed *in forma pauperis* and dismissed the complaint *sua sponte* without requiring a response from the petitioners.

The respondent alleged in his complaint in the District

Court that (1) his right to appeal his conviction had been denied; (2) his life was in danger; and (3) he was being subjected to cruel and unusual punishment. The respondent alleged and the Court found that during September, 1976, while the respondent had pending a habeas corpus petition in the Virginia Supreme Court, that petitioner Figgins allegedly told respondent that:

> "The Courts are not going to rule in your favor. Before they will do that, they will pay $5,000 to an officer to shoot you and make it look like an accident . . ."

The respondent further alleged that the officer emphasized this point by "putting forth his left hand and slapping it with his right hand," saying:

> "Yes, $5,000 in hand, and one morning you will get orders to report to work on a gun gang."

The respondent stated at the time the "threat" by petitioner Figgins was made that he was assigned to an institutional job inside the camp, where he was not subjected to armed correctional officers. On October 19, 1976, however, respondent was assigned by petitioner Nesselrodt to report to work on a road "gun gang." The respondent concluded his complaint with allegations that he had a "right to life and to appeal without the cruel and unusual punishment of death and the mental despair created by such a threat for doing so."

The District Court took judicial notice of another suit filed by petitioner, *Hudspeth* v. *Bowles and Carey,* Civil Action No. 76-909-AM (E.D.Va. December 8, 1976) (appeal dismissed by agreement of the parties by order of the United States Court of Appeals for the Fourth Circuit of January 20, 1977). The Court noted that it had previously

declined to interfere with the assignment of the respondent to road duty upon allegations partially related to the same incident in September involving petitioner Figgins.

The District Court found that the respondent's allegations of a denial of his right to appeal his convictions were patently frivolous and found as a matter of fact that based upon his own affidavit he had already filed with the Supreme Court of Virginia a petition for a writ of habeas corpus, and since October, 1976 (after the alleged threat by petitioner Figgins), he had filed with the District Court alone three separate complaints against various prison officials.

The District Court found further that as a matter of fact the respondent's fear to file appeals because he would be punished with death for doing so was incredible in light of respondent's litigious paperwork since the threat. The Court found that the respondent had not been denied access to the courts and furthermore, had not shown anything which would indicate a denial of his right to appeal. It should be noted, in addition, that after his allegations of intimidation, respondent appealed each of the complaints referred to by the District Court to the United States Court of Appeals for the Fourth Circuit. Those cases were styled *Hudspeth* v. *Blair,* No. 77-1441; *Hudspeth* v. *Superintendent, Unit #30,* No. 77-8301; and *Hudspeth* v. *Bowles and Carey, supra.*

The District Court found with regard to the respondent's second allegation that his life was in danger, that the alleged threat to his life involved a single incident four months prior to the Court's ruling, and since that time the appellant had been transferred to another job, and nothing had occurred which would even suggest a constant threat of violence of the magnitude required by *Woodhous* v. *Virginia,* 487 F.2d 889 (4th Cir. 1973), and dismissed that allegation as being without merit.

The Court found further that the respondent's third allegation of cruel and unusual punishment was similarly without merit. The Court noted that even though the claim was not particularized, there was no basis for it as it presented only an isolated threat by petitioner Figgins. There was by analogy to *Woodhous* no evidence of constant danger amounting to cruel and unusual punishment. It should be noted further that, contrary to the implied nature of the threat, the respondent continued to file litigation in the various courts. The Court thus dismissed the complaint for failure to state a claim upon which the Court could grant relief pursuant to the provisions of Rule 12(b)(6), *Federal Rules of Civil Procedure.*

The United States Court of Appeals, in a divided opinion (App. C) held, based upon an interpretation of *Lingo* v. *Boone,* 402 F. Supp. 768 (N.D. Cal. 1975) that an intentional threat reasonably calculated to deny access to the court is sufficient to establish a constitutional deprivation of the right to access to the Court. In addition, the panel held that there "may be a claim based upon the Eighth Amendment" if petitioners were acting in concert," intentionally placing Hudspeth [respondent] in fear for his life if he pressed his Court actions that would inflict such suffering as to amount to unconstitutional punishment." The Court apparently held that if petitioners were working in concert, and if respondent's fear was real, the punishment inflicted was entirely gratuitous and unnecessary and could be contrary to contemporary standards of decency. Consequently, the Court remanded the case to the District Court for a full evidentiary hearing allowing the petitioner an opportunity to prove his claims consistent with that Court's guidelines.

Petitioners filed on October 19, 1978, a timely Petition for Rehearing in the Court of Appeals, which was denied

by order of October 27, 1978. On November 1, 1978, petitioners moved the Court of Appeals for a stay of mandate to allow them an opportunity to pursue their Writ of Certiorari, which was granted for 30 days by order of November 7, 1978. An application was made for an extension on December 7, 1978, which was granted for an additional 30 days on December 8, 1978.

ARGUMENT

The Holding Of The United States Court Of Appeals That An Intentional Implied Threat By A Correctional Officer Constitutes A Denial Of Access To The Courts, And At The Same Time Cruel And Unusual Punishment If Believed By The Petitioner Is, It Is Submitted, A Complete Retreat From And Conflicts With Existing Law In The Country And Presents An Important Question of Federal Law, Which Has Not Been, But Should Be, Settled By This Court In At Least Two Aspects:

(A) The Holding Of The Court That An Intentional Threat Amounts To A Denial Of Access To The Courts If Reasonably Calculated To Do So Is Not A Correct Application Of Existing Law As It Fails To Consider Whether The Applicant's Access Was *Actually Obstructed; and*

(B) The Court's Holding That A Threat Which Places The Appellant In Fear For His Life Is Cruel And Unusual Punishment Is A Departure From Existing Law, Makes No Provision For An Objective Standard Of Reasonableness Relative To The Petitioner's Fear, And Extends The Jurisdiction Of 42 U.S.C. § 1983 To Common Law Tort Actions Clearly Contrary To The Decisions Of This Court.

A.

The Holding Of The United States Court Of Appeals That An Extentional Threat Amounts To A Denial Of Access To The Courts If Reasonably Calculated To Do So Is Not A Correct Application Of Existing Law As It Fails To Consider Whether The Applicant's Access Was Actually Obstructed.

The divided three-judge panel of the United States Court of Appeals has held, based upon an interpretation of *Lingo* v. *Boone, supra,* that an intentional threat reasonably calculated to deny access to the courts is sufficient to establish a constitutional deprivation of the right to access to the courts regardless whether there was actual obstruction of the right or not. In its opinion, the Court stated

> ". . . Nor is it necessary that the prisoner succumb entirely or even partially to the threat. It is enough that the threat was intended to impose a limitation upon the prisoner's right of access to the Court and was reasonably calculated to have that affect. (citation omitted)"

To begin with, *Lingo* does not support the proposition relied upon by the Court. As was pointed out by the dissent in the Court below, the Court in *Lingo* reasoned that under some exceptional circumstances it could fathom that threats of future punishment could have a chilling effect on the exercise of prisoners' constitutional rights, but that Court held that the prisoner's litigious history subsequent to the alleged threats belied his contention that his rights of access were *actually obstructed* and *granted summary judgment* to the *defendants* in that case.

Ironically, it was for the same reason that the Court in *Lingo* granted defendants summary judgment that the District Court denied relief to the respondent in this case. Aside from the fact, as Judge Hall pointed out in the dissent below, that it is inconceivable that anyone would reasonably believe that the Supreme Court of Virginia would have them killed rather than grant a writ of habeas corpus, it is as apparent in this case as in *Lingo* that the appellant's litigious history certainly belies his subjective fear, or that there has been *actual obstruction* of the appellant's right of access to the Courts.

Petitioners respectfully submit to the Court that such a result is contrary to the underlying principles evident from a literal reading of 42 U.S.C. § 1983 and their interpretations of this Court's opinions developing the substantive constitutional right of access to the courts under the Constitution where prisoner litigation it concerned. It is elementary that the provisions of 42 U.S.C. § 1983 require that a person be *deprived* of a constitutional right by another under color of state law. Similarly, this Court has consistently held generally that prison officials may not impermissibly impair or burden the exercise of the right to litigate. *Bounds* v. *Smyth,* 430 U.S. 817, 823-24 (1977); *Wolff* v. *McDonald,* 418 U.S. 539, 576, 579 (1954); *Johnson* v. *Avery,* 393 U.S. 483, 485-87 (1969); *Ex parte Hull,* 321 U.S. 546, 549 (1941).

In *Johnson* v. *Avery, Ex parte Hull,* and *Cochran* v. *Kansas,* 316 U.S. 255 (1941), the Court has consistently held that prison officials may not deny access by regulation or procedures calculated to frustrate inmate litigation, or by simply failing to file papers for the prisoner, and these *actions* were an abridgement of the constitutional right. Moreover, the Court we believe made it clear in *Bounds* v. *Smyth, supra,* that prison officials were under an affirmative duty *to provide* meaningful access to the courts where to do nothing would, in effect, amount to a deprivation of the right. But it is also clear in *Bounds* that the cornerstone of the right is "meaningful access."

In *Ross* v. *Moffett,* 417 U.S. 600, 616 (1974), this Court in holding that an indigent defendant was not entitled to court-appointed counsel to pursue discretionary appeals to the Supreme Court of North Carolina, and by way of *certiorari* to this Court, stated that:

> "The duty of the state under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an *adequate opportunity* to present his claims fairly in the context of the state's appellate process. We think respondent was given that opportunity under the existing North Carolina system." (Emphasis added)

Whether couched in terms of "meaningful access to the Courts" or "adequate opportunity to present his claims," it is our interpretation of this courts decisions that 42 U.S.C. § 1983 can only be invoked where prison officials have *deprived* an inmate either affirmatively by their actions or impliedly by their inactions of either *meaninful access* or *adequate opportunity* to pursue their claims in Court.

In this case, the Court of Appeals holds that a statement by a correctional officer (that the Supreme Court of Virginia will have a prisoner killed before granting his writ of habeas corpus) is a deprivation of access regardless of whether the statement is believed by the prisoner, or whether the prisoner has actually been denied access. Such a decision is, we believe, in distinct contradiction to this court's constitutional interpretations where it is quite clear that the prisoner's litigious history belies that he has been denied *actual access* to the courts by anyone.

The majority opinion of the Court of Appeals creating a cause of action under the Constitution for intentional conduct "reasonably calculated" to limit a prisoner's access to the court whether it actually did or not is a result not only

not contemplated by this Court's guiding decisions, it is clearly contrary to the holding of *Lingo* v. *Boone* relied upon by the Court of Appeals, and has not, we think, heretofore been the law in this Circuit. *See Coleman* v. *Peyton,* 362 F.2d 905 (4th Cir. 1966).

In addition, the decision is in conflict with at least four other Circuits and enumerable District Courts. *See Kostal* v. *Tinsley,* 337 F.2d 845 (10th Cir. 1964); *Conway* v. *Oliver,* 429 F.2d 1307 (9th. Cir. 1970); *Wilson* v. *Prasse,* 404 F.2d 1380 (3rd Cir. 1968); *Perry* v. *Jones,* 437 F.2d 760 (5th Cir. 1971); *United States ex rel. Smyth* v. *Heil,* 308 F. Supp. 1063 (E.D.Pa. 1970); *Reynolds* v. *Swenson,* 313 F. Supp. 328 (W.D.Mo. 1970).

In each of the cases cited above, the courts refused to hear allegations concerning denial of access to the courts or disallowed the particular plaintiffs' standing to assert such rights, where their litigation history belied actual access, and thus, prejudice to them.

It is submitted that such a result is also consistent with this Court's reasoning in *Bounds, Johnson* v. *Avery,* and *Ross* v. *Moffett,* making the ascertion of the right of the denial of access contingent upon whether or not there has been actual infringement.

B.

The Holding Of The United States Court Of Appeals That A Threat By A Correctional Officer Which Places A Prisoner In Fear For His Life Is Cruel And Unusual Punishment, Is A Departure From Existing Law, Makes No Provision For An Objective Standard Of Reasonableness Relative To The Prisoner's Fear, And Extends The Jurisdiction Of 42 U.S.C. § 1983 To Common Law Tort Actions Clearly Contrary To The Decisions Of This Court, As Well As Other Circuits Throughout The Country.

Relying on *Woodhous* v. *Virginia,* 487 F.2d 889 (4th Cir. 1973), the respondent alleged that the threat of respondent

Figgins (the Supreme Court would have him killed before granting his writ of habeas corpus) put him in fear of his life and constituted cruel and unusual punishment. The majority of the panel of the Court of Appeals held that a liberal construction of the complaint could allege a conspiracy between petitioners Figgins and Nesselrodt (who placed the plaintiff on a work detail some months later, where there were armed guards) to intentionally place the petitioner in fear for his life, which the Court found under contemporary standards of decency could amount to cruel and unusual punishment.

The holding of the panel is without cited authority of any kind, is accompanied by a strong and well reasoned dissent, and is contrary to all of the cases cited by the petitioners. In addition, petitioners point out to the Court that the implied threat of Officer Figgins doesn't even come close to an action cognizable under the holding of *Woodhous* v. *Oliver, supra,* relied upon by the respondent, which held that prison officials must take reasonable steps to protect inmates once they are aware of a pervasive risk of harm or a reign of violence within the institution, and that a prisoner has a right secured by the Eighth and Fourteenth Amendments to be reasonably protected from *constant* threat of violence and sexual assaults by his fellow inmates.

Needless to say in order to invoke the provisions of 42 U.S.C. § 1983 petitioner must state a claim of deprivation under a provision of the Constitution. Here we all assume he invokes the Eighth Amendment's prohibition against cruel and unusual punishment. But, petitioner's do not believe that the divided opinion of the panel below correctly embodies this Court's interpretations of the Eighth Amendment's proscription and we urge that the decision below carries the intent of the Eighth Amendment too far. We believe that the

Court's opinion has extended the Eighth Amendment beyond its intended boundaries and into conflict with the legislative intent of 42 U.S.C. § 1983 as discussed in *Paul* v. *Davis,* 424 U.S. 693 (1976) that the section was not intended to encompass all state law tort actions. Petitioners do not interpret this Court's decisions as having extended the Eighth Amendment to encompass a simple assault unaccompanied by a touching, bodily injury, or even reasonable mental anguish.

In the latest case giving guidance as to the meaning of cruel and unusual punishment in the area of prisons, *Estelle* v. *Gamble,* 429 U.S. 97 (1976), the Court tracked the history of the clause and explained it to be a flexible concept involving the unnecessary and wanton infliction of pain and embodying punishments incompatible with "evolving standards of decency that mark the progress of a maturing society" *Trop* v. *Dulles,* 356 U.S. 86 (1958). But, *Estelle* makes clear that not every claim of medical mistreatment would amount to "unnecessary and wanton infliction of pain" necessary to be cognizable under the Eighth Amendment. Indeed, claims of negligent malpractice were outside the ambit of the clause and hence the parameters of 42 U.S.C. § 1983.

Estelle does not seem to debark from cases which have required facts of extreme excessiveness of results to invoke the clause. *See Furman* v. *Georgia,* 408 U.S. 238 (1972) (and cases cited therein) and *Gregg* v. *Georgia, supra.* In prison cases, interpretations have heretofore required excessiveness in mode of punishment, conditions of confinement, or outrageousness of actions. Cases have ranged from those in which the prisoner has either been subjected to extreme physical violence with manifest injury, *see,* for example, *Jenkins* v. *Averette,* 424 F.2d 1228 (4th Cir. 1970), to excessive punishment which is disproportionate to the crime

imposed, *see Furman* v. *Georgia, supra; Robinson* v. *California,* 370 U.S. 660 (1962); *Ralph* v. *Warden,* 438 F.2d 786 (4th Cir. 1970), or to long term subjection to severe conditions which can be classified as shocking and degrading, *see Rodriquez* v. *Jimenez,* 409 F. Supp. 582 (D.Ct.P.R. 1976), *aff'd, Martinez* v. *Jimenez,* 551 F.2d 877 (5th Cir. 1977) (cited by appellant), or *Landman* v. *Royster,* 333 F. Supp. 621 (E.D.Va. 1971).

On the other hand, mere verbal abuse has not been held without much more to constitute cruel and unusual punishment, as prohibited by the Eighth Amendment of the Constitution. *See Johnson* v. *Glick,* 481 F.2d 1028 (2nd Cir. 1973); *Baxter* v. *Lewis,* 421 F. Supp. 504 (W.D.Va. 1976); *Bolden* v. *Mandel,* 385 F. Supp. 761 (D.Ct.Md. 1974); *Jones* v. *Superintendent,* 370 F. Supp. 488 (W.D.Va. 1974); *Collins* v. *Haga,* 373 F. Supp. 923 (W.D.Va. 1974); *Lunsford* v. *Reynolds,* 376 F. Supp. 526 (W.D.Va. 1974); *Fisher* v. *Woodson,* 373 F. Supp. 970 (E.D.Va. 1973). In fact, isolated incidents of shoving matches or clashes of temper have always been recognized as not constitutionally cognizable. *See Johnson* v. *Glick, supra; Bolden* v. *Mandel, supra.*

In addition, the holding of the Court of Appeals which, in effect, allows a cause of action under the Eighth Amendment for an offhand comment amounting to an implied threat is not only inconsistent with prior decisions of the District Court's of this Circuit, it is in direct conflict with the Second Circuit decision of *Johnson* v. *Glick, supra,* which is in conformity with the District Court opinions cited above. There appears to be no contrary authority in the Circuit Courts for the statement of law advanced by *Glick* and the representative District Court cases cited above that mere words and verbal harrassment do not amount to a constitutional violation, except for the opinion of the Court below.

As has been ably argued by Judge Hall in the dissent

below, the threat of Officer Figgins that the Supreme Court of Virginia would have the petitioner killed before granting his writ of habeas corpus, even if intentional, is so patently ridiculous that it simply could not be within the contemplation of this Court's interpretation of cruel and unusual punishment. Such an action, if cognizable at all,[1] is a common law tort action which this Court has heretofore failed to recognize as cognizable under 42 U.S.C. § 1983, as well as the Court below. *See Paul* v. *Davis, supra; Street* v. *Surdyka,* 492 F.2d 368 (4th Cir. 1974).

Even if the Court of Appeals' interpretation of the law were correct that an isolated intentional threat causing fear in the plaintiff is cognizable under 42 U.S.C. § 1983, it appears to be the better statement of the law that even the common law definition of simple assault does not protect extremely timid individuals, and thus an objective standard of reasonableness is required. *See* Prosser, Law of Torts, § 10, page 9; 6A CJS Assault & Battery § 6(b) p. 324; cf. 6 Am.Jur.2d Assault & Battery § 4, page 10.

There should, therefore, at the very least, be some objective standard to measure a plaintiff's fear similar to the reasonableness theory which has heretofore been necessary in tort actions. It is obvious upon the objective evidence in this case that the respondent was placed in no fear for his life, in fact, because of the threat of Officer Figgins. He continued to write writs contrary to the focus of the threat, and had no similar complaints in his work assignment and living conditions at the same unit with the two officers involved for over four months prior to filing this suit.

Even if this were not so, it is absolutely ridiculous and un-

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[1]Even at common law mere words do not amount to an action of assault. Restatement Torts 2d, § 31; Prosser, Law of Torts § 10, page 39. *Berkley* v. *Commonwealth,* 88 Va. 1017, 14 S.E. 916 (1892); *Harper* v. *Commonwealth,* 196 Va. 733, 85 S.E.2d 249 (1955).

reasonable for anyone to assume that the Supreme Court of Virginia is going to have anyone killed, and if the respondent believes this, his belief should be unreasonable as a matter of law. Consequently, this case should have been affirmed under constitutional or tort principles.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Constitutional Question Herein Is Of Exceptional Importance In The Administration Of Justice, The Decision Of The United States Court Of Appeals Is In Conflict With The Decisions Of Other Circuit Courts, And Consequently, Is An Appropriate Case For Review By This Court On Petition For A Writ Of Certiorari

The petitioners respectfully submit to the Court that there are at least two major reasons that the Court should review the decision of the United States Court of Appeals in this case. First, as has been previously discussed with regard to each of the issues presented, the decision of the Court of Appeals upon those respective issues is in conflict with other Circuit Courts throughout the country, as well as the decisions of a great many of the District Courts, especially in this Circuit. The many and varied decisions of the lower courts affecting prisoner rights have made it particularly difficult for prison officials to accomplish their awesome responsibilities and a multiplicity of decisions involving the custodial relationship is not conductive to decisive action, which is the bellwether of prison security.

Secondly, petitioners additionally submit to the Court that the Court of Appeals in interpreting the Eighth Amendment of the Constitution to include what has heretofore been (questionably) a simple assault based upon allegations of subjective injuries, and the Fourteenth Amendment to encompass intentional conduct of correctional officers which

could conceivably cause a denial of access to the Courts (whether they did or not) has apparently extended the parameters of 42 U.S.C. § 1983, far beyond its intended scope to include common law actions. In addition, it should be easy to foresee that if the doors of the federal courts are now open for these kinds of allegations it will have a substantial impact upon the administrative capabilities of correction's officials, and even further enmesh them in prisoner litigation.

Litigation involving testimony from correction's officials, evidence as to the subjective impact on the prisoner, as well as more extensive pre-trial preparation will be necessary in order to prepare for cases involving these allegations. Litigation of this type compels the administrative priorities of correction's officials, and is counterproductive to decisive action which in turn is reflected in the security of the prison. It is, in addition, not hard to foresee that the impact on the federal courts will be greatly increased to hear cases which will require extensive evidence concerning subjective fears at a time when their dockets are already grossly overcrowded.

In summation, the opinion of the Court below creates a conflict in the law throughout the Circuits, will have a devastating impact upon the administration of correctional facilities, and the federal courts, and poses issues which seek to frame the jurisdictional breath of the Constitution's Eighth Amendment, and 42 U.S.C. § 1983. Petitioner's, consequently, urge the Court, due to the importance of the issues to review the decision of the United States Court of Appeals for the Fourth Circuit, and grant their petition for a writ of certiorari.

CONCLUSION

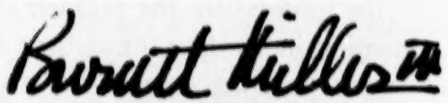
For the reasons stated above, petitioners respectfully pray that this Court will grant their petition for a writ of certio-

rari, and reverse and/or vacate the judgment of the Court below.

Respectfully submitted,

OFFICER DONALD FIGGINS, and
SERGEANT NESSELRODT,
Correctional Officers,
Field Unit #30,
Virginia Department of
Corrections
Petitioners Herein

J. MARSHALL COLEMAN
Attorney General of Virginia



BURNETT MILLER, III
Assistant Attorney General

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CERTIFICATE OF SERVICE

I, Burnett Miller, III, Assistant Attorney General of Virginia, of counsel for the petitioners, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 20th day of December, 1978, I mailed three copies of the foregoing Petition for a Writ of Certiorari to the Judgment of the United States Court of Appeals for the Fourth Circuit to Noel H. Thompson, Esquire, 2304 Wilson Boulevard, Suite 309, Arlington, Virginia 22201, counsel for respondent.

BURNETT MILLER, III
Assistant Attorney General

APPENDIX

APPENDIX A

In The

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

James Martin Hudspeth Virginia Department of Corrections Field Unit #30	)	
Plaintiff,	)	
vs.	)	Civil Action
Donald Figgins Sergeant Nesselrodt Correctional Officers of Virginia Department of Corrections Field Unit #30	)	No. 77-46-AM

Plaintiff wishes to file a *pro se* complaint, for he is without counsel. Haines v. Kerner 404US519, 1972.

Plaintiff feels that:

1. His right to life is in danger.
2. His right to appeal his conviction has been denied him.
3. He has been subjected to cruel and unusual punishment.

(See attached statement).

At the time Officer Donald Figgins made this statement to me I was assigned an inner-institutional job and did not come into contact with armed penal system personnel.

However, on October 19, 1976, Officer Nesselrodt ordered Plaintiff to report to work on a road gun gang.

Plaintiff feels this was an attempt on his right to life. Plaintiff fears to file his appeals because he fears he will be punished with death for doing so. This is to deny his right to appeal.

Plaintiff feels he has a right to life and to appeal without the cruel and unusual punishment of death and the mental despair created by such a threat for doing so.

Plaintiff feels that he as a resident of the Virginia Department of Corrections is entitled to relief from such threats on his life and mental mistreatment and prays the Court will accept this as any legal form necessary for he is without counsel.

JAMES M. HUDSPETH
Plaintiff

I cannot remember the exact date to the day this event occurred, only to say it was approximately four to five weeks after the filing of a writ of habeas corpus with the Supreme Court of Virginia, Record No. 761053 on August 13, 1976.

I was standing on the front steps of field unit #30, Fairfax, Virginia, when penal system officer, Donald Figgens related the following to me:

> "The courts are not going to rule in your favor. Before they will do that, they will pay five thousand dollars to an officer to shoot you and make it look like an accident."

He then emphasized his point by putting forth his left hand and slapping it with his right hand, saying:

> "Yes, five thousand in the hand and one morning you'll get orders to report to work on a gun gang."

Then he patted his side where a firearm is normally worn and turned and walked away.

JAMES M. HUDSPETH

Subscribed and sworn to before me on this 26 day of December, 1976.

MARIE A. HUDSPETH
Notary Public

My commission expires 29 August, 1979.

FORMA PAUPERIS AFFIDAVIT

I hereby apply for leave to proceed with this complaint without prepayment of fees or costs or giving security therefore. In support of my application, I state under oath the following facts are true:

(1) I am the plaintiff in said complaint, and I believe that I am entitled to redress.

(2) I am unable to repay the cost of said action, or give security therefore, because:
I have no gainful employment or other means of financial income; I have no monetary assets, securities or collateral:

(3) I have no assets or funds, which could be used to prepay the fees or cost except *"None"*

JAMES M. HUDSPETH
Signature of Plaintiff

State of *Virginia*
County (City) of *Fairfax*

JAMES M. HUDSPETH, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

JAMES M. HUDSPETH
Signature of Plaintiff

Subscribed and Sworn to before me this 26 day of December, 1976.

Notary Public

APPENDIX B

In The

UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

James Martin Hudspeth,	)	
Plaintiff,	)	
v.	)	Civil Action
Donald Figgins,	)	No. 77-46 A-M
Sergeant Nesselrodt,	)	
Defendants.	)	

Filed January 18, 1977, Clerk, U. S. District Court, Alexandria, Virginia.

ORDER

Let the complaint tendered by James Martin Hudspeth be filed *in forma pauperis.*

Hudspeth is presently incarcerated in Fairfax County, Virginia, at Field Unit #30 of the Virginia Department of Corrections. The defendants in this case are correctional officers of that field unit.

Hudspeth alleges:

(1) That his right to appeal his conviction has been denied;

(2) That his life is in danger; and

(3) That he is being subjected to cruel and unusual punishment.

The facts underlying this complaint are simple. During

September, 1976, while Hudspeth had pending a habeas corpus petition to the Virginia Supreme Court, the defendant Figgins allegedly told Hudspeth that he would not be successful with his petition. Figgins said that, before the courts would rule in Hudspeth's favor, they would pay an officer to shoot him. The killing would take place on the "road gun gang." One month later (October 19, 1976) Hudspeth was ordered by defendant Nesselrodt to report to the road gang under armed supervision, instead of his former inner-institutional job not under armed supervision.

In a previous suit filed by Hudspeth, *Hudspeth* v. *Bowles and Carey,* Civil Action No. 76-909-AM (E. D. Va., Dec. 8, 1976), this Court held that this identical job reassignment involved an area of prison administration with which the courts would not interfere unless paramount federal constitutional or statutory rights were violated. Within three weeks of the date of that order Hudspeth returned with the present suit alleging denials of constitutional rights; however, these new claims stem from the same isolated incident in September, 1976.

Hudspeth's first allegation—denial of his right to appeal his conviction—is patently frivolous. The plaintiff stated in his own affidavit that he has filed with the Supreme Court of Virginia a petition for a writ of habeas corpus. Since October, 1976, he has filed with this Court alone three separate complaints against various prison officials. His claim now that he "fears to file his appeals because he fears he will be punished with death for doing so" is incredible when one considers Hudspeth's litigious paperwork since the alleged threat. Clearly, Hudspeth has not been denied access to the courts; furthermore, he has not shown anything which would indicate a denial of his right to appeal.

Hudspeth's second allegation—threat to his life—as previously discussed, involved a single incident four months ago. Since that time, he has been transferred appropriately to another job which in no manner violates his constitutional rights. Nothing having occurred which could even suggest a constant threat of violence of the magnitude required by *Woodhaus* v. *Virginia,* 487 F.2d 889 (4th Cir. 1973), the claim is without merit.

The third allegation—cruel and unusual punishment—is also without merit. Even though the claim is not particularized, there is no basis for this claim. If the claim deals solely with the fact of assignment to a "road gun gang," then the claim is one which previously has been decided adversely to Hudspeth. If in addition the claim deals with the isolated threat made by Figgins, then, as previously discussed, his life is not in any type of constant danger which amounts to cruel and unusual punishment.

Accordingly, it is ORDERED that the complaint by Hudspeth is dismissed for failure to state a claim upon which this Court can act. F. R. Civ. P. 12(b)(6).

Should plaintiff desire to appeal written notice of appeal must be received by the Clerk of this Court within thirty (30) days from the date of this Order.

The Clerk is directed to send a copy of this Order to the plaintiff.

United States District Judge

Alexandria, Virginia
January 18th, 1977

A True Copy, Teste: W. Farley Powers, Jr., Clerk.

By

Deputy Clerk

APPENDIX C

In The

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-1442

James Martin Hudspeth,

Appellant,

v.

Donald Figgins, Sergeant Nesselrodt, Correctional Officers of Virginia Department of Corrections Field Unit #30,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued January 10, 1978 Decided October 5, 1978

Before HAYNSWORTH, *Chief Judge,* BUTZNER AND HALL, *Circuit Judges.*

Noel H. Thompson for Appellant; Burnett Miller, III, Assistant Attorney General (Anthony F. Troy, Attorney General of Virginia on brief) for Appellees.

PER CURIAM:

Hudspeth's § 1983 complaint was dismissed for failure to state a claim upon which relief could be granted. We reverse, for, liberally construing Hudspeth's *pro se* complaint, as we must under *Haines* v. *Kerner,* 404 U.S. 519 (1972), we think he stated a claim of constitutional deprivation.

Hudspeth, a Virginia prisoner, claims that the two defendants, institutional officers, interfered with his access to the courts, placed his life in danger, and subjected him to cruel and unusual punishment. These claims arise out of two incidents. The first one is described in the complaint in the following language:

> I was standing on the front steps of field unit #30, Fairfax, Virginia, when penal system officer, Donald Figgins, related the following to me:
>
> "The courts are not going to rule in your favor. Before they will do that, they will pay five thousand dollars to an officer to shoot you and make it look like an accident."
>
> He then emphasized his point by putting forth his left hand and slapping it with his right hand saying:
> "Yes, five thousand in the hand and one morning you'll get orders to report to work on a gun gang."
>
> Then he patted his side where a firearm is normally worn and turned and walked away.

Hudspeth's hearing was impaired. Allegedly because of that, Hudspeth was assigned to an unguarded work detail within the correctional institution. He alleges, however, that, as predicted by Figgins, Sergeant Nesselrodt ordered him transferred to a road gang under the supervision of two armed guards. He alleged that he feared for his life as a result of an "accident" while working with the road gang,

that the threat and the transfer were intended to limit his right of access to the courts, to endanger his life, and to subject him to mental anguish.

There was an institutional investigation which resulted in a determination that allegations about the conversation with Figgins were based upon actual fact, and that Figgins' employment by the Department of Corrections had been terminated. Those and all other allegations must be accepted as true since the complaint was dismissed for failure to state a claim. *Jenkins* v. *McKeithen,* 395 U.S. 411.

When a court is asked to appraise the legal sufficiency of a complaint by a motion under Rule 12(b)(6), it must follow the accepted rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hospital Building Co.* v. *Trustees of Rex Hospital,* 425 U.S. 738, 746 (1976); *Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957). This "concededly rigorous standard," *Hospital Building Co., supra,* applies to *pro se* inmate complaints filed under 42 U.S.C. § 1983. *Haines* v. *Kerner, supra; Gordon* v. *Leeke,* 547 F.2d 1147, 1151 (4th Cir. 1978); *Wirth* v. *Surles,* 562 F.2d 319, 321 (4th Cir. 1977); *Johnson* v. *Mueller,* 415 F.2d 354, 355 (4th Cir. 1969). A *pro se* complaint must be read liberally, and such persons are not held to the strict pleading requirements otherwise required of attorneys. *Estelle* v. *Gamble,* 429 U.S. 97, 106-07 (1976); *Haines* v. *Kerner, supra.* Thus the power summarily to dismiss a prisoner's *pro se* complaint is limited.

State prisoners have a constitutional right of meaningful access to the courts which a state may not abridge nor impair; nor may it impermissibly burden its exercise. *Bounds* v. *Smith,* 430 U.S. 817, 823-24 (1977); *Wolff* v. *McDonnell,*

418 U.S. 539, 576, 579 (1974); *Cruz* v. *Beto,* 405 U.S. 320, 321 (1972) (per curiam); *Johnson* v. *Avery,* 393 U.S. 483, 485-87 (1969); *Ex Parte Hull,* 312 U.S. 546, 549 (1941); *Blanks* v. *Cunningham,* 409 F.2d 220 (4th Cir. 1969); *Coleman* v. *Peyton,* 362 F.2d 905, 907 (4th Cir. 1966). Once judicial proceedings have been commenced, the state may not punish a prisoner for having sought judicial remedies. *Russell* v. *Oliver,* 552 F.2d 115, 116 (4th Cir. 1977); *Haymes* v. *Montanye,* 547 F.2d 188 (2d Cir. 1976).

A threat of physical harm to a prisoner if he persists in his pursuit of judicial relief is as impermissible as a more direct means of restricting the right of access to the courts. Nor is it necessary that the prisoner succumb entirely or even partially to the threat. It is enough that the threat was intended to impose a limitation upon the prisoner's right of access to the court and was reasonably calculated to have that effect. *See Lingo* v. *Boone,* 402 F. Supp. 768, 775 (N. D. Ca. 1975).

With the liberal construction to which it is entitled, we think the complaint states a claim against Figgins for his threat of physical harm if Hudspeth pursued his judicial remedies and, in light of that earlier threat, against Nesselrodt for transferring him to the road gang under the supervision of armed guards, if it can be proven that Nesselrodt knew of Figgins' threat.

But, of course, there would be no claim if Figgins intended his remarks as a joke, and Hudspeth understood them not to have been serious. If that were the case, however, it is unlikely that Figgins' employment would have been terminated.

Moreover, there may be a claim based upon the Eighth Amendment prohibition of cruel and unsual punishment. If Figgins and Nesselrodt were acting in concert, intentionally placing Hudspeth in fear for his life if he pressed his court actions that would inflict such suffering as to amount to un-

constitutional punishment. The life of a prisoner is a dreary one of suffering, but the Constitution prohibits the infliction upon a prisoner of unnecessary suffering which is inconsistent with contemporary standards of decency. If Hudspeth can prove his claim, if Figgins and Nesselrodt were working in concert and Hudspeth's fear was real, the punishment inflicted was entirely gratuitous and unnecessary.

Of course, we hold only that Hudspeth should be given an opportunity to prove his claims. Whether or not he is ultimately entitled to any relief can then be determined upon an evidentiary record.

REVERSED AND REMANDED.

HALL, CIRCUIT JUDGE, DISSENTING:

I must dissent from the majority opinion which holds that a single, patently incredible threat made by a correctional officer to an inmate, and subsequent administrative reassignment of the inmate to a different work detail, state a claim of constitutional magnitude.

I.

Placing Petitioner's Life In Danger

The majority notes without discussing Hudspeth's claim that his life has been placed in danger by virtue of his reassignment to a road work gang supervised by two armed guards. Hudspeth has previously raised this claim, *Hudspeth v. Bowles and Carey,* C/A No. 76-909-AM (E.D.Va. December 8, 1976) (appeal dismissed by agreement of the parties by order of this court of January 20, 1977), in the context of a malpractice claim against two prison physicians who certified that he was physically able to perform his assigned task as waterboy for the road crew.

An operation some months before had left Hudspeth with 60% hearing loss in one ear. The gist of his complaint in the malpractice action was that he might not hear orders given by the armed guards assigned to the road work gang, and thus be shot for disobeying; the gist of his revised complaint in the case before us is that the guards may carry out the threat made by Officer Figgins. Either contention is patently frivolous.

It should be noted that armed guards are a regular feature of prison life; there is no reason for this court to assume that their presence at the road work site was in any way unusual or threatening to Hudspeth. In the judgment of two prison doctors, Hudspeth was capable of performing his assigned

job. No constitutional violation results from a prisoner's assignment to a particular job which he is capable of performing. *Cf., Cassidy* v. *Superintendent, City Prison Farm, Danville, Va.*, 392 F. Supp. 330 (W.D.Va. 1975). And federal courts have no authority to interfere with the administration of a state prison unless paramount federal constitutional or statutory rights are violated. *Wolff* v. *McDonnell*, 94 S.Ct. 2963 (1974). Therefore I vigorously dissent from any implication in the majority opinion that Hudspeth has stated a viable claim of endangerment to his life.

II.

Right Of Access To The Courts

The majority cites *Lingo* v. *Boone*, 402 F. Supp. 768, 775 (N.D. Calif. 1975) for the proposition that a threat which is intended to impose a limitation upon a prisoner's right of access to the courts is impermissible. I have no argument with this statement of the law; however, an examination of *Lingo* demonstrates that it has no application to the case before us.

First, the threats made by correctional officers in *Lingo* were real and substantial: punishment and harrassment by guards, and denial of parole. In contrast, the statement made by Officer Figgins was patently absurd: assassination by order of the Virginia Courts. Second, the court in *Lingo* found that Lingo's "litigious history . . . belie[d] his contention that his right of access to the courts ha[d] been obstructed," and accordingly denied relief. 402 F.Supp. at 775-76. In the case before us, the district court found that Hudspeth had commenced three separate lawsuits against prison officials since the date on which the threat was made; each of these cases was appealed to this court. *Hudspeth* v. *Blair*, No. 77-1441 (4th Cir., Nov. 2, 1977); *Hudspeth* v. *Superintendent, Unit # 30*, No. 77-8301 (pending before the court); *Hudspeth* v. *Bowles and Carey, supra.* In addition, he filed a petition for a writ of mandamus before the Supreme Court of Virginia. On these facts I cannot believe that Hudspeth can possibly make out a claim of deprivation of his right of access to the courts.

In similar vein, any constitutional claim against defendant Nesselrodt is frivolous. There is no allegation that Nesselrodt was in collusion with Figgins; his work reassignment of Hudspeth was made at least three weeks after the threat by Figgins, and after Hudspeth's treating physicians had certified that he was physically able to perform the allotted task; and again, any fears Hudspeth may have harbored about the routine practice of having an armed guard at the work detail was at best subjective and unfounded.

III.

Cruel And Unusual Punishment

The majority also holds that Hudspeth may have stated a claim of cruel and unusual punishment. I cannot agree that the outrageous threat made to Hudspeth or his nonpunitive re-assignment to a different work detail are "wanton infliction of unnecessary pain" or "inconsistent with contemporary standards of decency . . . ." *Estelle* v. *Gamble*, 97 S.Ct. 285, 290, 291 (1976). Furthermore, this isolated incident is without the ambit of *Woodhous* v. *Virginia*, 487 F.2d 889 (4th Cir. 1973), relied upon by Hudspeth.

If Hudspeth was actually fearful for his life—which is frankly incredible to me—then his reaction was totally unreasonable. In the tense and often hostile environment of a prison, regrettable and even reprehensible statements will be made by correctional officers. An isolated incident such as this one may be grounds for discipline of the officer, but,

absent some compelling circumstances not present here, the incident will not be grounds for a claim of constitutional magnitude. I fear the flood of litigation under 42 U.S.C. § 1983 which may result from the majority's unwarranted solicitude of Hudspeth in this case.

In conclusion, even viewing the facts of this complaint under the standards of *Haines* v. *Kerner,* 404 U.S. 519 (1972), I believe that he "can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957). I feel compelled to note also that there is no indication in this record that Hudspeth's life is "a dreary one of suffering," and I expect that this gratuitous comment in the majority opinion will be cited to this court in numerous prisoner petitions in the future.

I would affirm the well-reasoned decision of the district court, and I must strongly dissent.